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| CLERK'S NOTICE | DOCKET NUMBER<br>0472CR00117 | Trial Court of Massachusetts<br>The Superior Court |
|---|---|---|
| CASE NAME:<br>**Commonwealth vs. Daniel J Prunty** | | Scott W. Nickerson, Clerk of Court<br>Barnstable County |
| TO:<br>File Copy | | COURT NAME & ADDRESS<br>Barnstable County Superior Court<br>3195 Main Street<br>Barnstable, MA 02630 |

You are hereby notified that on 01/10/2017 the following entry was made on the above referenced docket:

**Endorsement on , (#201.0): ALLOWED**
**After an initial review of this motion, the opposition, memoranda and supporting documents, the defendant's request for an evidentiary hearing is ALLOWED and is now set for 9am, April 18, 2017 in Barnstable, habe to issue.; parties notified**

| DATE ISSUED | ASSOCIATE JUSTICE/ ASSISTANT CLERK | SESSION PHONE# |
|---|---|---|
| **01/11/2017** | **Hon. Gary A Nickerson** | **(508)375-6684** |

Date/Time Printed 01-11-2017 11:18:04

SCR016\ 06-2014

The Commonwealth is directed to file its opposition thereto, if any, within 90 days.
Kinder J
4/22/16

SUPERIOR COURT
BARNSTABLE, SS
Filed MAR 28 2016
Scott W. Nickerson Clerk

201

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

Barnstable, ss.

Superior Court Department
Crim. No: BACR2004-00117

#201

After an initial review of this motion, the opposition, memoranda and supporting documents the defendant's request for an evidentiary hearing is ALLOWED and is now set for 9 AM, April 18, 2017 in Barnstable, subject to recall.
Kinder J
1/10/17

COMMONWEALTH

V.

DANIEL PRUNTY

DEFENDANT'S MOTION FOR A NEW TRIAL

NOW COMES the defendant, Mr. Daniel Prunty, in the above-entitled matter and pursuant to Mass. R. Crim. P. 30(b), moves this Honorable Court to grant him a new trial. Mr. Prunty also moves pursuant to Mass. R. Crim. P. 30(c)(4), for an evidentiary hearing on this motion for a new trial.

As cause therefore, as set forth in the attached affidavits, exhibits, and memorandum, Mr. Prunty states that he was denied his right to effective assistance of counsel in the presentation of his defense. Trial and appellate counsels' errors violated Mr. Prunty's right to effective assistance of counsel as guaranteed by Article 12 of the Massachusetts Declaration of Rights and the Sixth and Fourteenth Amendments of the United States Constitution. Strickland v. Washington, 466 U.S. 668, 687 (1994); Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

These errors also violated Mr. Prunty's right to present a defense as protected by the Fifth and Fourteenth Amendments and



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Article 12 of the Massachusetts Declaration of Rights. Moreover, the State of Massachusetts statutorily provides that "a person accused of crime shall at his trial be allowed to be heard by counsel, to defend himself, to produce witnesses and proofs in his favor ...." G.L. c. 263, § 5.

More specifically, Mr. Prunty asserts that trial counsel and appellate counsel failed to investigate, develop or prepare a viable defense in this case. Defense counsel failed to obtain and utilize expert witnesses that would have undermined the Commonwealth's theory of the case. Additionally, trial counsel did not obtain or develop at trial evidence that contradicted the testimonial evidence introduced by the Commonwealth. Together, these failures constitute ineffective assistance of counsel.

Further, the police and the prosecutor violated Mr. Prunty's federal and state due process rights when they threatened and subsequently incarcerated the only two witnesses to the shooting until they changed their version of events to inculpate the defendant. Additionally, both witnesses were rewarded for their testimony at trial when they received lenient sentencing deals. Such circumstances prove implicit and undisclosed deals for favorable testimony.

WHEREFORE, for the foregoing reasons and those presented in the memorandum, the defendant requests a new trial and an

Article 12 of the Massachusetts Declaration of Rights. Moreover, the State of Massachusetts statutorily provides that "a person accused of crime shall at his trial be allowed to be heard by counsel, to defend himself, to produce witnesses and proofs in his favor ...." G.L. c. 263, § 5.

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Further, the police and the prosecutor violated Mr. Prunty's federal and state due process rights when they threatened and subsequently incarcerated the only two witnesses to the shooting until they changed their version of events to inculpate the defendant. Additionally, both witnesses were rewarded for their testimony at trial when they received lenient sentencing deals. Such circumstances prove implicit and undisclosed deals for favorable testimony.

WHEREFORE, for the foregoing reasons and those presented in the memorandum, the defendant requests a new trial and an

evidentiary hearing on this motion and for a ruling on his motion under rule 25(b)(2) previously filed.

Respectfully submitted,
DANIEL PRUNTY
By his attorney,

Date: 3/24/16

Patricia Quintilian
Attorney at Law
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BBO # 600469
E-mail: atty@pqappeals.com

CERTIFICATE OF SERVICE

I, Patricia Quintilian, do hereby certify that I served the within Motion by mailing, first class, postage pre-paid, a copy to the all parties of record on March 25, 2016:

Barnstable District Attorney's Office, 3231 Main Street, P.O. Box 455, Barnstable, MA 02630.

Signed under the pains and penalties of perjury on March 25, 2016.

Patricia Quintilian, Esq.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

Barnstable, ss. Superior Court Department
Crim. No: BACR2004-00117

COMMONWEALTH

V.

DANIEL PRUNTY

MEMORANDUM OF LAW IN SUPPORT OF
HIS MOTION FOR A NEW TRIAL

**PROCEDURAL HISTORY**

On August 31, 2004, a Barnstable County grand jury indicted Mr. Prunty for first degree murder, assault and battery with a dangerous weapon, and attempted extortion. The charged offenses arose out of a single shooting incident that occurred on August 7, 2004, at Mr. Prunty's home. The case was tried before a Barnstable County Superior Court jury from February 7, 2006, through February 15, 2006. On February 15, 2006, the jury returned convictions on all counts: murder in the first degree on a theory of deliberate meditation, assault and battery with a dangerous weapon, and attempted extortion. The trial court sentenced Mr. Prunty to life imprisonment without the possibility of parole on the first degree murder conviction with determinate concurrent sentences for the remaining convictions.

On May 23, 2012, the Supreme Judicial Court affirmed the convictions. No motions for a new trial were filed in this case.

On August 16, 2013, Mr. Prunty filed a motion for a new trial under Mass. R. Crim. P. 25(b)(2). On August 22, 2013, the trial court allowed Mr. Prunty's request not to decide the motion under rule 25(b)(2) until the he filed this motion under rule 30(b).

## STATEMENT OF THE EVIDENCE

## DEFENDANT'S STATEMENT OF EVIDENCE

At the time of the shooting, Mr. Prunty was forty four years old, divorced, and a father of two daughters. Prunty's Aff. He was a general contractor who owned his own business. Id. He built residential custom homes, additions, and renovations. Id. To date, he has served approximately eleven years of his sentence. Id.

On August 6, 2004, Mr. Prunty went to a bar located in Hyannis with Rebecca Pape, Jason Wells, (the victim) and his girlfriend, Katie Finnegan. Id. Mr. Prunty's cocaine use brought him in contact with Rebecca Pape, a known and admitted heroin and cocaine addict, and her friends. Prunty Aff.; Ex.5 at 401, 402. Mr. Prunty did not have a romantic relationship with Rebecca Pape at any time. Prunty Aff.; Ex.5 at 401,404. The four individuals and Rebecca's friends, Michaela Davenport and her boyfriend, Marc Rosa, returned to Mr. Prunty's house around 2:15 a.m.. Prunty Aff. Katie Finnegan and Jason Wells left shortly thereafter. Id. Mr. Prunty went to bed around 3:30 a.m.. Id.

Rebecca Pape, Michaela Davenport and Marc Rosa were all gone when Mr. Prunty awoke the next morning around 8:00-8:30 a.m. Id.

At approximately noon the next day, Jason Wells and his friend, Richard Ford, knocked on Mr. Prunty's door and wanted to use some cocaine they brought with them. Id. Mr. Prunty never met Richard Ford before and he hardly knew Jason Wells. Id. Mr. Wells had a severe drug addiction to cocaine. Ex.5 at 403. Mr. Prunty reluctantly let them in and shortly thereafter discovered that some cash, watches and his mother's jewelry were missing. Prunty Aff. Mr. Prunty immediately called Rebecca Pape because he suspected that she or one of her friends had stolen his property. Id. This suspicion ultimately proved accurate because Pape subsequently admitted that she and Jason Wells conspired and effectuated a plan to steal Mr. Prunty's money and jewelry. Ex.5 at 403. Mr. Prunty asked Pape to come over to his home so that his property could be returned. Prunty Aff. Ms. Pape acceded to his request and said she would be over in about an hour. Id.

While waiting for Pape to get to Mr. Prunty's house, Jason Wells smoked some cocaine with Richard Ford and then went to pick up his girlfriend, Katie Finnegan, and her daughter. Id. They all returned to Mr. Prunty's home at some later point, Katie Finnegan then left with her daughter. Id.

Pape arrived at Mr. Prunty's home with Michaela Davenport, Marc Rosa and Chris Rose (Pape's prior boyfriend). Id. Mr. Prunty did not know Chris Rose, nor had he ever met him before. Id. Pape was extremely agitated and aggressive when she entered Mr. Prunty's home. Id. Pape began arguing with Jason Wells about who stole Mr. Prunty's property. Id. Rebecca Pape then spit at Jason Wells and chased him with a carving knife. Id. Jason Wells then picked up a coffee table located in the living room in an attempt to defend himself; Wells then dropped the table and one of the legs broke off. Id. This arguing lasted for about thirty minutes. Id. During this heated argument, Richard Ford and Marc Rosa went downstairs to the finished basement to continue their drug use. Id. Marc Rosa and Michaela Davenport left shortly thereafter. Id.

At this time, Rebecca Pape, Jason Wells, Chris Rose, (Pape's prior boyfriend), and Mr. Prunty were on the first floor and Richard Ford was still downstairs in the basement getting high. Id. Still without any movement as to who stole Mr. Prunty's property, Mr. Prunty impulsively went upstairs and got a rifle from his bedroom closet. Id. He got the rifle's magazine and put it in his short's pocket. Id. Mr. Prunty got the magazine because Chris Rose threatened to "cap" his ass and he was afraid of him. Id.

Mr. Prunty then went downstairs to the dining room where

Jason Wells was sitting at the head of the table. Id. Rebecca Pape was standing to his left. Id. Mr. Prunty held the gun about waist high in his right hand in order to scare whoever stole his stuff so that the thief would return his property. Id. It was his intention to scare the truth out of Pape or Wells. Id. He never inserted the magazine in the rifle at any time, nor did he ever cock the rifle at any time. Id. Mr. Prunty thought the rifle was empty. Id.

After pointing the rifle at Jason Wells, Wells immediately confessed to stealing Mr. Prunty's property. Id. Mr. Prunty then told Wells that he was going to get his mother's rings back and Prunty walked him into the kitchen and handed him the phone. Id. Mr. Prunty then placed the rifle on the peninsula. Id. At this point in time, Jason Wells is standing on the inside of the kitchen side of the peninsula. Id. Chris Rose is standing directly on the opposite side of the peninsula in the dinette area. Id. Jason Wells began dialing the phone and Mr. Prunty began walking down the hallway towards the bathroom to apologize to Rebecca Pape for wrongly accusing her of stealing his stuff. Id.[1] Rebecca Pape opened the bathroom door and Mr. Prunty heard a "pop." Id. Both Pape and Mr. Prunty ran to the kitchen where they both saw Jason Wells lying flat on the kitchen floor. Id.

[1] This apology was misguided because Pape did in fact conspire and steal Mr. Prunty's jewelry.

His head was in front of the cabinet separating the refrigerator and the oven. Id. There was blood spewing from his head. Id.

At this moment, Mr. Prunty looked at Chris Rose who was hysterical and frantically wiping the rifle down with his t-shirt. Rose blurted out, "the nigga killed himself." Id. At this point, the cellar door swings open with Richard Ford standing at the top of the stairs. Id. He sees Wells on the floor and Ford then tries to close the cellar door to retreat down the stairs. Id. Mr. Prunty held the cellar door open and tried to stop Ford from running down the stairs, but to no avail. Id. Mr. Prunty said to Ford, "where are you going, a kid just got shot?" Id. Richard Ford continued running down the stairs and exited the house through the outside door in the finished basement. Id.

Mr. Prunty immediately called 911 for help. Id. Without stopping to help, Pape just kept running out of Mr. Prunty's home. Id. She drove away from Mr. Prunty's home in her car so fast that her tires were screeching up the street. Id. She never stopped to help Jason Wells; she just kept running. Id.

At this point in time, Rose also began running out of Mr. Prunty's home and Mr. Prunty grabbed him and prevented him from leaving. Id. Mr. Prunty told him that he was the only one to witness the shooting and he had to stay and tell the police what happened. Id. While waiting for the paramedics and police, Mr.

Prunty took the magazine out of his pocket and placed it on the kitchen counter next to the door leading to the basement. Id.

Mr. Prunty was not in the kitchen when Jason Wells was shot, nor did he ever fire the rifle at any time on the day of the shooting. Id. Because he did not witness the shooting, any explanations or statements made by him to the police were simply guesses as to what happened based upon Chris Rose's statement that the "nigga killed himself." Id. At the scene, immediately after the shooting, Rose told the police that he did not witness the shooting. Ex.11 at 1,2; Ex.17 at 30-31. Contradicting himself, Rose told the police that Wells "shot himself." Ex.11 at 3.

According to Trooper White, Pape told him that Chris Rose asked her to lie and say that Prunty was not in the bathroom with her when Wells was shot. Ex.10 at 188. Chris Rose told Pape that "he did not want to be the only one in the room or the area when Wells shot himself." Ex.10 at 188. Pape and Rose were in a romantic relationship prior to the shooting and Pape "wanted to help him out so she lied" to the police. Ex.10 at 188. In order to further help her ex-boyfriend, Pape, at the behest of Rose, obtained and destroyed the clothes that Chris Rose was wearing on the day of the shooting. Aff. of Katie Finnegan, Wells' girlfriend.

Mr. Prunty was placed under arrest and a Gunshot Residue test was taken within three and a half hours of the shooting. Id. The test was negative. Ex.17 at 25; Ex.10 at 190. Mr. Prunty was placed in a cell that did not have a sink or running water where he could wash his hands. Id. There was no opportunity to wash off any evidence on himself or his clothing. Id. All of the clothes that Mr. Prunty was wearing on the day of the shooting were seized by the police immediately after the shooting. Ex.18 at 1-4.

Mr. Rose was not placed in custody and was allowed to leave the scene of the shooting and go to the police station unescorted by a police officer. A Gunshot Residue test was taken of Rose's hands within three and a half hours of the shooting. Ex.17 at 12. The test was negative. Mr. Rose instructed Rebecca Pape to get rid of the clothes he was wearing on the day of the shooting. Aff. of Ms. Finnegan. Two days after the shooting, Mr. Rose gave a shirt to the police that he stated he was wearing on the day of the shooting. Ex.11 at 2.

**DEFENDANT'S STATEMENT OF FORENSIC EVIDENCE**

The prosecutor, during his opening argument, told the jury that "forensic evidence won't play a very big role" in the case and that he was relying on eyewitness testimony in order to convict Mr. Prunty. Tr. Feb. 7, 2006, at 117,118. In light of the very serious credibility issues underpinning all of the

above-listed Commonwealth witnesses, the forensic evidence in this case is the only reliable and accurate way to discern what happened in Mr. Prunty's home on the day of the shooting. Unfortunately, defense counsel failed to introduce at trial appropriate expert opinion that would prove that the shooting was an accident and that the Commonwealth's eyewitness accounts of the shooting simply could not have happened as alleged based upon ballistic and bloodstain pattern expert analysis and opinion.

There was no forensic evidence that tied Mr. Prunty to the shooting. Mr. Prunty's hands were tested for gunshot residue immediately after the shooting and they tested negative for any residue. Ex.10 at 190; Ex.17 at 25. Mr. Prunty's fingerprints were not found on the gun. Ex.10 at 191. There was no blood found on the clothes that Mr. Prunty was wearing at the time of the shooting. Ex.17 at 3-4. Further, the blood that was found on Mr. Prunty's hand immediately after the shooting was not from Jason Wells. Ex.17 at 12. Additionally, the Commonwealth also tested some jeans that were worn by Mr. Prunty at the time of the shooting. Ex.17 at 7-8. These also tested negative for Jason Wells D.N.A.. Ex. 17 at 12; Ex.18 at 12-13. No forensic evidence tied Mr. Prunty to this shooting. Ex.17-18.

**Expert Opinion of Mr. Chris Robinson:**

It is the opinion of Mr. Robinson, a certified expert in Firearms Analysis, Gunshot Residue Analysis, Blood Spatter Analysis, Crime Scene Reconstruction, and Shooting Reconstruction, that the shooting in this case was an accidental shooting. Aff. of Mr. Robinson.

Specifically, the rifle that was used in the shooting that occurred on August 7, 2004, at 6 Palomino Way, Sandwich, Massachusetts, was a Ruger 22 semiautomatic rifle, Model 1022. Id. The victim was shot once with this rifle using CCI high velocity .22 rim fire ammunition. Immediately after the shooting, the police observed and subsequently seized the rifle's magazine from a counter located in the kitchen. Id. The rotary magazine holds a maximum of 10 cartridges. Id. It is uncontroverted that there were nine .22 live cartridges in the magazine after the shooting. Id. It is also uncontroverted that after the shooting, the police seized the rifle from a kitchen counter with the magazine removed. Id. At the time of the seizure, the rifle's chamber was also empty and the safety was in the off position. Id.

In order to load the Ruger semiautomatic rifle, the magazine is loaded into the weapon's magazine well. Id. When the bolt is drawn to the rear and released, the firing mechanism is cocked and the first live cartridge from the top of the magazine

is inserted in the rifle's chamber and is now ready for firing. Id. Thereafter, one shot for each pull of the trigger will fire a bullet in the rifle's chamber until one stops firing or the supply of cartridges is exhausted (the magazine is empty). Id.

When the rifle is fired, the striker mechanism ignites the primer of the cartridge casing and subsequently ignites the main powder charge. Id. The bullet is driven out of the barrel and the explosion forces the bolt to the rear. Id. The cartridge casing is ejected to the right and rear of the weapon. Id. The bolt is spring loaded and it automatically goes forward removing the next live cartridge from the magazine. Id. The rifle is re-cocked and the rifle is once again ready to fire with another pull of the trigger. Id.

Based upon the mechanics of the rifle, if the magazine was in the rifle's magazine well, another cartridge would be automatically loaded in the rifle. Id. This is not what happened in this case. Id. When the rifle was seized by the police, the chamber was empty. Id. If the magazine was in the rifle, another round would have been automatically loaded and there would have been a live round in the rifle's chamber. Id. Further, there were 9 rounds in the magazine seized at the crime scene. Id. If the magazine was in the rifle, with the automatic loading of the next live round, there would have been 8 rounds in the magazine instead of nine. Id. Based upon a forensic analysis of the

evidence, the magazine was not loaded in the rifle's magazine well at the time of the fatal shooting. Id.

Mr. Robinson opined that the fatal shot occurred when a remaining cartridge was left in the rifle's chamber after the rotary magazine was removed from the rifle at a point in time prior to the shooting. Id. With this rifle, the magazine can be removed and a cartridge that has already been loaded will remain in the rifle. Id. With a bullet in the firing chamber, the gun can be fired. Id.; Ex.7 at 763-764. As such, with the rotary magazine not in the rifle, the shooter would have no way of knowing that a live round was left in the rifle. Id. Mr. Robinson opines that the shooting in this case was an accidental shooting. Id. A majority of accidental shootings occur when the shooter is unaware that a cartridge remains in the firing chamber without the handler's knowledge. Id.

**EVIDENCE OF DUE PROCESS VIOLATIONS**

After the shooting, Rebecca Pape told the police, the Grand Jury, an investigator, Mr. Prunty, and her boyfriend, Confessor Llamas, and Brian Iliffe that she was in the bathroom with Mr. Prunty when Wells was shot and killed. Aff. of Brian Iliffe, Rebecca Pape trial testimony, Ex.5 at 421,425-428; Rebecca Pape statement, Ex.1 at 17-23; Pape Grand Jury Testimony, Ex.2 at 17-19; Recorded conversations of Rebecca Pape, Ex.6 at 2-8,11,17-18,23,25-39,40-45. As a result of giving Mr. Prunty this alibi,

the police repeatedly called her a liar and threatened her with incarceration. Ex.1 at 20,22,23,26-27,35-37. They forced Pape to take a lie detector test over and over again. Ex. 1 at 28-29.

Immediately before her Grand Jury testimony, the prosecutor and state police called Pape a liar and accused her of trying to protect Prunty. Ex.1 at 32-33. The prosecutor told Pape that she would be going to jail for perjury and that he would make sure she did "jail time." Ex.1 at 32-33. Pape felt that she was being forced to commit perjury by the police and prosecutor. Id. at 33; Aff. of Iliffe. The prosecutor followed through on his threat and arrested and placed Pape in jail until she changed her story. Ex.3 at 1.

Testifying before the Grand Jury, Trooper White made it clear that Pape's lawyer advised her to make a deal with the prosecutor before testifying at Prunty's trial. Ex.10 at 187. According to Trooper White, Pape told him that Chris Rose asked her to lie and say that Prunty was not in the bathroom with her when Wells was shot. Id. at 188. Chris Rose told Pape that "he did not want to be the only one in the room ... when Wells shot himself." Ex.10 at 188. Pape and Rose were previously romantically involved prior to the shooting and Pape "wanted to help him out so she lied" to the police. Ex.10 at 188. In order to further help her ex-boyfriend, Pape, at the behest of Chris

Rose, obtained and destroyed the clothes that Chris Rose was wearing on the day of the shooting. Aff. of Katie Finnegan.

In an effort to obtain a deal for her pending criminal matters, Pape told Trooper White that she needed a deal and wanted help with her court cases. Ex.10 at 189. Specifically, in response to a direct question from Trooper White where he asked her if Prunty was in the bathroom with her at the time she heard the gunshot, Pape stated, "Yes. I know that's not what you wanted to hear, but I need a deal and I need help with my court cases." Id. Moreover, Pape wanted to move to North Carolina and being on probation or in jail would prevent her from doing so. Ex.10 at 187.

Despite all this pressure, during her Grand Jury testimony, Pape testified that Prunty was with her in the bathroom when Wells was shot. Ex.2 at 16-18,27. Pape was immediately indicted for perjury, Ex.3, *Pape indictment*. After serving sixteen months for the perjury charge, Ex.4 at 22-23, Pape testified at trial that she saw Prunty shoot Wells. Ex.5 at 415-416.

Soon after Pape's trial testimony, she was allowed to plead guilty to perjury (a crime exposing her to a twenty year sentence) and to many additional crimes for which she received time served and was allowed to leave Massachusetts and move to North Carolina, her desired wishes as previously stated. Ex. 4 at 11,22-23. The prosecutor described the perjury charge as a

"significant perjury," but his recommendation for the light sentences and ability to move to North Carolina was appropriate because of her testimony at Mr. Prunty's trial. Ex.4 at 22-23. He further stated that his "recommendation is appropriate based on" her trial testimony. Id. at 22.

Chris Rose also exculpated Mr. Prunty to the police and to the Grand Jury. Specifically, immediately after the shooting, Rose told the police that "he did not witness the shooting." Ex. 11 at 1; Ex.13 at 6. Additionally, Rose also testified under oath at Mr. Prunty's grand jury hearing that he was not in the room where the shooting occurred and he did not see what happened at the time of the shooting. Ex.12 at 148-150, 153-157, 162-166. At the hearing, Mr. Rose also thought that Wells had shot himself because "he's so depressed from everybody antagonizing him." Id. at 156-157. Mr. Rose further elaborated that he never saw the gun immediately before or after the shooting. Id. at 159, 169, 176.

Five months before trial began in Mr. Prunty's case, Rose was charged with perjury. Ex.13. Mr. Rose recanted his exculpatory testimony that he had given to the Grand Jury. Ex.13. Rose incriminated Prunty at trial while he was incarcerated for perjury pending trial on his own perjury charges for his exculpatory testimony at Mr. Prunty's grand jury hearing. Ex.9 at 588; Ex.13. Just seventeen (17) days after his

trial testimony on February 10, 2006, Rose received a very lenient sentence of one year after pleading guilty to perjury and was released shortly thereafter on time served. Ex.14 (Rose Plea Colloquy Transcript). This light sentence is also perplexing in light of Rose's lengthy criminal history. Ex.14. (CORI history).

The third significant witness against Prunty, Thomas Salamone, a known informant, testified only to what was contained in the police reports. Ex.15 at 843-844, 846,848-849. According to Salamone, during Salamone's alleged conversations with Prunty while they were incarcerated together, Prunty admitted to shooting Wells. Ex.15 at 848. Salamone was incarcerated at the time of this testimony and he was "trying to work out a plea agreement." Ex.15 at 863. As a result, Salamone also received a light sentence after pleading guilty to multiple charges of breaking and entering, larceny from a building, larceny of a motor vehicle, operating a motor vehicle to endanger, failure to stop for police, leaving the scene after causing property damage, forgery, uttering, and larceny. Ex.16 at 2-4. Salamone Plea Colloquy. The prosecutor stated to the sentencing judge that his recommendation of 27 months in the House of Correction sounded "very odd" for the seriousness of the charged offenses. Ex.16 at 8. The seriousness of these charges was echoed by a second prosecutor at the sentencing

hearing who was also the prosecuting attorney at Mr. Prunty's trial. Ex.16 at 28. More perplexing is that no probation was requested by the prosecutor or ordered by the sentencing judge for an individual with such a long criminal history. Ex.16 at 8; Ex.15 at 864-867. Salamone was sentenced essentially to time served and was released within weeks of his testimony. Ex.16 at 8. Before testifying against Prunty, Salamone was facing up to twenty years in prison. Id. at 13.

The prosecutor at Mr. Prunty's trial asked the sentencing judge for Salamone to adopt his lenient recommendation for such serious charges because Salamone was "an individual who to some degree has helped the government in cases; and for that reason, as a mitigating factor, we're making this recommendation." Ex.16 at 28. The sentencing judge adopted the prosecutor's recommendation and Salamone was released from custody shortly after the hearing.

Richard Ford, an individual with serious addictions to heroin and cocaine and an inability to comply with his probation conditions, also received lenient treatment after his testimony implicating Mr. Prunty in the shooting. Ex.20 at 1-7. Specifically, Ford had a long standing history of violating his probation and for these violations bail was consistently set for $5,000. Ex.20 at 5-6. On August 11, 2004, four days after the shooting, a warrant issued for Richard Ford for violating the

conditions of his probation. Ex.20 at 6. On August 18, 2004, the day after Ford testified implicating Mr. Prunty in the shooting, Ford's warrant was recalled, no bail was required as previously done for his probation violations, and Ford was allowed to choose another treatment program of his choosing. Ex.20 at 6,8. Interestingly, Pape confirms the existence of a deal made with the prosecutor/police for Ford's testimony when she that the police "[got] rid of all his probation surrenders ... and they put him in a halfway house to get him clean." Ex.6 at 46-47. This statement confirms exactly what transpired on August 18, 2004, the day after Ford's testimony and the fact that Ford's probation violations were resolved. Ex.20 at 6.

These four witnesses, each having significant conflicts of interest and self-serving motives to falsely implicate Prunty, essentially comprised the Commonwealth's entire case against Mr. Prunty.

**COMMONWEALTH'S STATEMENT OF EVIDENCE**

The evidence is set out in the SJC's opinion in the light most favorable to the Commonwealth. Commonwealth v. Prunty, 462 Mass. 295 (2012). The SJC's opinion recites the following:

On the evening of August 6, 2004, the defendant held a party at his home in Sandwich where several individuals, including Jason Wells, the victim, were using cocaine. After the

party, the defendant noticed that money, watches, and jewelry were missing. He suspected Wells.

The next day, the defendant, Wells, and Richard Ford used cocaine at the defendant's home. At some point, the defendant confronted Wells about the missing items and an argument ensued. Wells in turn accused Rebecca Pape, a friend of Wells who had also been at the defendant's home the night before. The defendant then telephoned Pape, telling her that he knew that she had taken his "stuff" and he wanted it back. Pape, with Christopher Rose and two other individuals, drove to the defendant's home, where the argument between the defendant and Wells was ongoing.

When Wells went into the dining room and sat down, the defendant proceeded upstairs, retrieved his Ruger .22 caliber rifle, and returned to where Wells was sitting. The defendant pointed the rifle at Wells' head and cocked it, telling him, "If you don't get my stuff by sunrise, you'll never see another sunrise again."

Rose intervened, pushing the rifle away and consoling Wells who had started to cry. Wells admitted his role in taking the defendant's property and went into the kitchen to make a telephone call to retrieve the stolen items. When Wells could not reach anyone, the defendant again pointed the gun at his head. This time, the defendant fired into Wells' head.

Pape, having witnessed the shooting, began "panicking." The defendant told her what their story would be: Wells had shot himself while Pape and the defendant had been in the bathroom. The defendant called the Sandwich police to report an accidental shooting. When officers responded, the defendant told them that someone had "shot himself" and led them into the kitchen where Wells was lying on the floor with a gunshot wound to the forehead. The officers detected a pulse and attempted unsuccessfully to resuscitate Wells; he was pronounced dead on arrival at a Boston area hospital.

Police questioned the defendant at the scene; he denied shooting Wells, saying that he had been talking with Pape in the hallway when the shot was fired. He admitted, however, that he had used the rifle to threaten Wells into giving his property back. He was arrested for assault and battery by means of a dangerous weapon.

## ARGUMENT

**I. Trial and appellate counsel provided ineffective assistance of counsel by their failure to hire and utilize appropriate experts during their investigation and presentation of the case at both the trial and appellate level.**

**A. Defense counsels' failure to utilize a ballistics expert deprived the defendant of a substantial ground of defense.**

A defendant is entitled to effective assistance of counsel under both the state and federal constitutions. U.S.Const.,

amend. VI; M.G.L. Const. Pt.1 Art.12; Commonwealth v. Saferian, 366 Mass. 89 (1974); Strickland v. Washington, 466 U.S. 668 (1984). A claim of ineffective assistance of counsel is assessed by the utilization of a two pronged test:

> 1. The examination and appraisal of specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel falling measurably below that which might be expected from an ordinary fallible lawyer; and, if such conduct is found,
>
> 2. Whether the incompetency deprived the defendant of an otherwise substantial ground of defense. Commonwealth v. Saferian, 366 Mass. 89, 96 (1974); Strickland v. Washington, 466 U.S. 668, 690-691 (1984).

The right to effective assistance of counsel afforded by Article Twelve provides greater safeguards than the Bill of Rights of the United States Constitution. Commonwealth v. Pena, 31 Mass. App. Ct. 201, 202 n.1 (1991). Therefore, if the Saferian test is met, then the test set out in Strickland v. Washington, 466 U.S. 668, 690-691 (1984) is also met. Commonwealth v. Cardenuto, 406 Mass. 450, 454 n.8 (1990).

In the instant case, the defendant was denied his constitutional right to effective assistance of counsel because defense counsel, both trial and appellate, failed to hire and utilize appropriate experts in this case. As such, critical and probative exculpatory evidence was never introduced at trial. This failure deprived the defendant of a substantial ground of defense.

The charged offenses arose out of a single shooting incident that occurred on August 7, 2004 at 6 Palomino Way, Sandwich, Massachusetts. The rifle that was used in the shooting was a .22 caliber semiautomatic rifle, Ruger model 1022. Ex.7 at 739. The victim was shot once with this rifle using high velocity .22 rim fire ammunition. Ex.7 at 754. This rifle uses a rotary magazine which holds a maximum of 10 bullets/rounds. Id. at 739,743,758. It is uncontroverted that there were nine .22 caliber live cartridges in the magazine after the shooting. Id. It is also uncontroverted that after the shooting, within minutes, the police seized the rifle from a kitchen counter with the magazine removed. Id. at 742. Also, at the time of the seizure, the rifle's chamber was empty and the safety was in the off position. Id.

In order to load this Ruger semiautomatic rifle, the magazine is loaded into the weapon's magazine well. Aff. of Robinson at 2; Ex.7 at 743. When the bolt is drawn to the rear and released, the firing mechanism is cocked and the first live cartridge from the top of the magazine is inserted into the rifle's chamber and is now ready for firing. Aff. of Robinson at 2; Ex.7 at 743. Thereafter, one shot for each pull of the trigger will fire a bullet in the rifle's chamber until one stops firing or the supply of bullets is exhausted (the magazine is empty). Aff. of Robinson at 2; Ex.7 at 743-744. The bolt is

spring loaded and it automatically goes forward removing the next live cartridge from the magazine. Aff. of Robinson at 3; Ex.7 at 743,745. The rifle is re-cocked and the rifle is once again ready to fire with another pull of the trigger. Aff. of Robinson at 3; Ex.7 at 743-745. The workings of this rifle as delineated by Mr. Robinson is in agreement with the Commonwealth's expert who testified at trial. Ex.7 at 739,742-746.

Based upon the mechanics of this rifle, if the magazine was in the rifle's magazine well, another bullet would have been automatically loaded in the rifle. Aff. of Robinson at 3; Ex.7 at 743-744. This is not what happened in this case. When the rifle was seized by the police, the chamber was empty. If the magazine was in the rifle, another round would have been automatically loaded and there would have been a live round in the rifle. Aff. of Robinson; Ex.7 at 743,745. Further, there were nine (9) rounds in the magazine seized at the crime scene. Ex.7 at 739,743,758. If the magazine was in the rifle at the time of the shooting, the next live round would have been automatically loaded and there would have been eight (8) rounds left in the magazine instead of nine. Aff. of Robinson at 3. Based upon expert ballistic analysis of the evidence in this case, the magazine was not loaded in the rifle's magazine well at the time of the fatal shot. Aff. of Robinson 3-4.

Expert ballistic analysis confirms that the fatal shot occurred when a remaining bullet was inadvertently left in the rifle's chamber after the rotary magazine was removed from the rifle at a point in time prior to the shooting. Aff. of Robinson. With this rifle, the magazine can be removed and a bullet that has already been loaded will remain in the rifle. Aff. of Robinson at 3,4. With a bullet in the firing chamber and without a magazine in the rifle, the gun can be fired. Aff. of Robinson at 4; Ex.7 at 763-764. The Commonwealth's firearm expert also confirmed at trial that the rifle could be fired without a magazine, but with a bullet still in the chamber. Ex.7 at 763. Additionally, this rifle can be fired without cocking the rifle. Aff. of Robinson at 4. As such, with the rotary magazine not in the rifle, the shooter would have no way of knowing that a live round was left in the rifle. Aff. of Robinson at 4. Based upon this forensic evidence, Mr. Robinson concluded that this shooting was an accidental shooting. Aff. of Robinson at 4.

In the instant case, the defendant was convicted of murder in the first degree on a theory of deliberate meditation. In order to be convicted of first degree murder with deliberate premeditation, the prosecution must prove beyond a reasonable doubt the following:

1. the defendant committed an unlawful killing;

2. the killing was committed with malice; and,

3. the killing was committed with deliberate premeditation. G.L.c.265 § 1.

The impact of the expert's conclusion that the shooting was an accident negates the existence of both malice and premeditation.

In Commonwealth v. Pichardo, 45 Mass. App. Ct. 296 (1998), the Court held that the defendant was entitled to a new trial because the trial judge confused the jury instructions and erroneously defined "malice." This confusion blurred the line between murder in the second degree and manslaughter. The case involved a fight between the victim and the defendant and several other individuals. Several hours later, the victim was shot by the defendant who was sitting in a car. Shortly thereafter, the defendant made the following statement: "What the fuck; I thought the gun was empty." Id. at 298. The defendant was subsequently found guilty of second degree murder.

In granting a new trial, the court reasoned that the necessary "malice" for second degree murder could be found if the jury "believed that the defendant knew he was shooting with a loaded gun." Id. at 300. The court went on to explain that if the jury concluded that the defendant thought the gun was empty, then the defendant did not act with malice and therefore could not be found guilty of murder. Id. The Court stated that if the jury found that the defendant thought the gun was empty, the

defendant could, at best, be found guilty of involuntary manslaughter. Id.

The shooting in this case was an accidental shooting and as defined in the Pichardo case, the necessary "malice" requirement is factually missing. As such, there is not a scintilla of evidence that would support a murder one case. Moreover, Mr. Prunty kept the magazine in his pocket and never inserted it into the rifle. Aff. Prunty. This fact is corroborated by the forensics and mechanics of the rifle. Aff. Robinson. This evinces a state of mind where Mr. Prunty was acting "to ensure that the gun was unloaded." Commonwealth v. Pichardo, 45 Mass. App. Ct. at 300. Because the elements of malice and premeditation are missing in this case, a murder one conviction cannot legally stand.

Expert opinion confirms that the fatal shot occurred when a remaining bullet was inadvertently left in the rifle's chamber after the rotary magazine was removed from the rifle at a point in time prior to the shooting. Aff. of Robinson at 3-4. As such, with the rotary magazine not in the rifle, the shooter would have no way of knowing that a live round was left in the rifle. Aff. of Robinson at 4. Unintentionally leaving a firearm loaded is more likely to occur with a removable magazine fed firearm like the rifle in this case. Aff. of Robinson at 4. The magazine can be removed giving an unloaded appearance even when a round

remains chambered. Aff. of Robinson at 4. The ballistic expert opined that this shooting was an accidental shooting (an unintentional discharge or an event of a firearm discharging at a time not intended by the user). Aff. of Robinson at 4. Further, most gun accidents, even with individuals with substantial gun experience, are caused by bullets left in the chamber and the magazine removed giving the gun an unloaded appearance. Aff. of Robinson at 4.

In the instant case, trial counsel obtained the necessary funds and did hire a ballistic expert. Ex.8 at 1. This expert was retained one month before trial. Ex.8 at 18. Moreover, defense counsel had intended to call this expert at trial, however, no ballistics expert was ever utilized at trial by the defense. Ex.8 at 2,16. It is unclear why this expert was not utilized at trial.[2] Apparently, defense counsel was planning to utilize a firearm expert to opine that gunshot residue would be found "in the vicinity of the shooting." Ex.8 at 2. In addition, trial counsel also wanted the expert to explain gunshot residue testing, shooting scene reconstruction, and whether gunshot residue would be found on the shooter's clothing. Ex.8 at 2,15. It is unclear why this probative information was not used by the defense. More problematic however, is that there is no mention

[2] Present appellate counsel attempted to obtain trial counsel's trial tactics with regard to not using this expert, but to no avail. Ex.8 at 12,14; affidavit of Patricia Quintilian.

of ballistic analysis that addresses the fact that this was an accidental shooting. Ex.8 at 2,15. What is certain however, is that the defense did not present any expert evidence in this case, a case seriously begging for expert analysis.[3]

Failure to present expert evidence in this case was fatal to the defense and removed probative evidence from the jury's purview. Namely, the specific intent necessary for murder in the first degree on a theory of deliberate premeditation would be missing. At best, the facts of this case would only support a lesser included offense of second degree murder. However, the facts of this case realistically support involuntary manslaughter. Apparently, trial counsel was aware of this issue when he stated to the court that "an accident based upon [the shooter's] lack of knowledge that the weapon was loaded certainly serves as an affirmative defense to that crime." Ex.8 at 4. Further, the Commonwealth has the burden to prove beyond a reasonable doubt that the shooting was not an accident. Commonwealth v. Podkowka, 445 Mass. 692, 699 (2006). Trial counsel was aware of this issue and not using an expert to support the defense of an "accident" was manifestly unreasonable and constitutes ineffective assistance of counsel. Commonwealth v. Conley, 43 Mass. App. Ct. 385, 394 (1997)(trial counsel's

[3] It is unclear from CPCS records whether Mr. Jachimowicz worked on this case because the docket numbers and defendants' names are in discord in the billings records. Ex.8 at 17-21.

discretion as to whether to investigate certain evidence "does not extend to the failure to investigate a critical source of potentially exculpatory evidence.")

The jury convicted the defendant of murder in the first degree on a theory of deliberate premeditation. With respect to a charge of murder in the first degree with deliberate premeditation, the only aspect of malice that can support a guilty verdict is an actual intent to kill the victim. Commonwealth v. Carter, 429 Mass. 266, 267 (1999). Further, the killing must also be with deliberate premeditation. G.L.c.265 §1. Deliberate premeditation requires a specific intent that the defendant act with the intent that his actions will cause death and that he acted with sufficient time to reflect on that consequence. Commonwealth v. Judge, 420 Mass. 433, 441 (1995).

In the case at bar, expert evidence shows that this shooting was an accident. The rifle in this case was fired without the magazine, thus giving the rifle the appearance that it was unloaded. Aff. of Robinson. If the shooter was unaware that a bullet had been chambered and thought that the rifle was not loaded, pulling the trigger would be an unintentional or negligent discharge. Aff. of Robinson. Therefore, the specific intent necessary for murder in the first degree on a theory of deliberate meditation is missing and the facts would support a lesser included offense. Unfortunately, the jury never heard

that this shooting was an accidental shooting. It was manifestly unreasonable not to present this exculpatory expert evidence to the jury. (Commonwealth v. Haggerty, 400 Mass. 437, 441 (1987)(counsel ineffective in not hiring an expert to determine if defendant's actions were the cause of the victim's death).

In Commonwealth v. Conley, 43 Mass. App. Ct. 385 (1997), the Appeals Court granted a new trial because defense counsel's tactical decision not to move for a forensic examination of the victim's knife to test for the presence of blood was manifestly unreasonable. In arriving at its decision, the Court reasoned that the finding of blood on the knife would have seriously undermined, if not destroyed, the credibility of the alleged victims upon which the Commonwealth's case rested almost entirely. The Court further found that the defendant's repeated requests to his trial counsel to test the knife was an important variable in the assessment of defense counsel's performance. Id. at 395.

Similarly, in the case at bar, Mr. Prunty repeatedly asked both trial and appellate counsel to hire an expert to examine the rifle and the evidence surrounding the shooting. Ex.8 at 8-11; Aff. of Mr. Prunty. All to no avail. This strong request by Mr. Prunty tips the balance towards a finding of ineffective assistance of defense counsel in failing to utilize a ballistic expert at trial. Appellate counsel also failed to obtain expert

evidence that would have shown that the shooting was an accident. Ex.8 at 8-11. Failure to employ a forensic expert for developing the primary defense in this case was manifestly unreasonable.

More problematic is that the Commonwealth's theory of the case is simply scientifically impossible. The Commonwealth argued that the rifle was loaded at the time of the shooting. Ex.19 at 7. As previously discussed, the rifle was without the magazine at the time of the shooting. Further, the prosecutor misstated the evidence and stated that "the gun can't fire without being cocked." Ex.19 at 9. As previously discussed, this is clearly wrong. Ex.7 at 763-764; Aff. of Robinson.

Further exacerbating this error, the prosecutor then added the following:

"And again, what did he say to the police about the box clip? It was either in my hand or in my pocket the entire time before the shooting. I never put this clip in the gun. I never cocked the gun. The gun was empty at all times. And I ask you, ladies and gentlemen, how then does an empty gun shoot?" Ex.19 at 10. Again, clearly wrong.

The Commonwealth's expert, as well as Mr. Robinson, are both in agreement that this rifle can be fired without the magazine and without the rifle being cocked. Ex.7 at 763-764; Aff. of Robinson. As previously discussed, the prosecutor's

statements were simply wrong and these errors were compounded by defense counsel's failure to object to the prosecutor's erroneous statements made during closing argument. The prosecutor's erroneous statement basically removed an accidental theory of the shooting from the jury's consideration.

In essence, this shooting was an accidental shooting and the forensic evidence simply does not support the Commonwealth's theory of the case. Defense counsel is under a duty imposed by both state and federal constitutional law to conduct an independent investigation of the facts, including an investigation of the evidence on which the Commonwealth intended to prove the defendant's guilt. Commonwealth v. Baker, 440 Mass. 519, 529 (2003). Defense counsel, both trial and appellate counsel, failed to undertake such an investigation and as such, were ineffective in their representation of the defendant.

**B. Defense counsel's failure to retain appropriate experts prevented any meaningful impeachment of the Commonwealth's only two alleged witnesses to the shooting.**

Massachusetts courts have frowned upon an attorney's failure to properly prepare a defense especially when a case involves a serious offense. Commonwealth v. Saferian, 366 Mass. 89, 98 (1974). Dependence on improvised cross-examination alone, even if it will surely be of virtuosic quality, is not to be recommended. Id. Such was the situation in this case when trial

counsel failed to present any expert evidence when the case screamed for such evidence.

In the instant case, defense counsel's failure to utilize expert testimony prevented any meaningful impeachment of the Commonwealth's two main witnesses, Chris Rose and Rebecca Pape. As discussed later in this motion, the credibility of these two witnesses is highly suspect. However, trial counsel failed to utilize critical expert testimony that would have forensically undermined the credibility of these two witnesses. Simply put, the stories told by these two witnesses at trial were physically impossible based upon the working mechanics of the gun.

Specifically, Chris Rose testified that Mr. Prunty went up to the second floor of his home and came down with the Ruger .22 caliber rifle. Ex.9 at 603. Rose further explained that Mr. Prunty showed the magazine full of bullets to Mr. Wells and then "jammed" the magazine into the magazine well; Mr. Prunty "pulled" and "clicked" the bolt and had his "hand on the trigger." Ex.9 at 603. Mr. Rose further testified that Mr. Prunty then pointed the gun at Mr. Wells' head and said, "[Mr. Wells] was going to die." Ex.9 at 603. Chris Rose then stated that Mr. Prunty and Ms. Pape went into the kitchen area. Ex.9 at 604. Rose further testified that he saw Mr. Prunty shoot Mr. Wells in the kitchen area and then place the rifle on the

kitchen peninsula after he removed the magazine. Ex.9 at 659-660.

Based upon the review of the evidence and expert analysis, Rose's observations concerning the defendant and the rifle are simply impossible. As previously discussed, based upon the mechanics of this rifle and upon expert ballistic analysis of the evidence, the magazine was not loaded in the rifle's magazine well at the time of the fatal shot. Aff. of Robinson. Therefore, Chris Rose's testimony that the defendant shot Mr. Well's with the magazine still in the rifle is simply impossible and a lie. Additionally, Rose's statement that the defendant removed the magazine after shooting Mr. Wells is also impossible because the magazine was never in the rifle. Ex.9 at 659-660; Aff. of Mr. Robinson. Moreover, Mr. Rose's statement that he saw the defendant "[pull]" and "[click]" the bolt of the rifle is also impossible because the forensics show that the rifle was fired without the magazine in the rifle and if the defendant had cocked the rifle, the bullet in the chamber would have been ejected. Aff. of Robinson. Forensically speaking, none of Mr. Rose's observations could have happened. Defense counsel did not cross-examine Rose on the scientific impossibility of his story because defense counsel never utilized a ballistic expert at trial.

Further, defense counsel also failed to retain a blood and bloodstain pattern expert in this case. Expert testimony is permitted to explain the physical characteristics of blood and to interpret bloodstain patterns in order to reconstruct a crime and potentially refute or corroborate the account of a witness or defendant about how a crime occurred. Commonwealth v. Simmons, 419 Mass. 426, 432-433 (1995). Mr. Robinson opined that Blood Spatter Analysis, or testing by simulating spatter patterns with the weapon and ammunition is forensically necessary in this case and that the failure to do this testing fell below the standards of forensic analysis. Aff. of Robinson at 9-10.

Specifically, in this case, Rose testified at trial that immediately after the shooting, he went to Wells who is lying on the floor with blood spewing from the wound in his head and "grabbed [Wells] by his face and asked him to hold on." Ex.9 at 612. Mr. Robinson, who is an expert in Blood Spatter Analysis and Crime Scene and Shooting Reconstruction, opined that Rose's testimony that he grabbed Well's face is "highly suspect based upon the blood spatter evidence." Aff. of Robinson at 9.

Further elucidating, Mr. Robinson explains that "the grabbing of the victim's face with the amount of blood spatter spewing with the attendant velocity from the wound would have left Mr. Rose's hands and clothing full of blood. No blood was

found on his hands or clothing. Further, the presence of Mr. Rose interrupting the blood flow would have presented a disrupted blood flow pattern, none of which was present in this case. The blood spatter evidence does not forensically support Mr. Rose's trial testimony." Id. at 9. Again, the jury did not hear this expert analysis because the defense did not obtain such expertise, nor present any expert analysis at trial.

The only other alleged witness to the actual shooting was Ms. Pape. Also discussed later in this motion, the credibility of this witness at trial is also highly suspect. Ms. Pape testified that the defendant "went upstairs, grabbed a gun ... came downstairs ... cocked the gun, which made a clicking sound" and pointed the gun at Mr. Wells. Ex.5 at 411-412. She further elaborated that the magazine was already in the rifle. Ex.5 at 412. Ms. Pape went on to testify at trial that the defendant subsequently shot Mr. Wells in the kitchen. Ex.5 at 416. As with Mr. Rose's testimony, Ms. Pape's observations concerning the defendant and the rifle were simply not scientifically possible.

Forensically speaking, none of these observations could have happened. As previously discussed, based upon the mechanics of this rifle and upon expert ballistic analysis of the evidence, the magazine was not loaded in the rifle's magazine well at the time of the fatal shooting. Aff. of Robinson. Therefore, Ms. Pape's testimony that the defendant shot Mr.

Well's with the magazine still in the rifle is simply impossible. Moreover, Ms. Pape's testimony that the defendant "cocked the gun, which made a clicking sound" when he pointed the gun at Mr. Wells is wrong because the forensics show that the rifle was fired without the magazine in the rifle and if the defendant had cocked the rifle, the bullet in the chamber would have been ejected. Aff. of Robinson. Defense counsel did not cross-examine Ms. Pape on the scientific impossibility of her story because defense counsel never utilized a ballistic expert at trial.

According to the Commonwealth, the only two witnesses to the shooting were Mr. Rose and Ms. Pape. The forensic impossibility of their stories regarding the rifle was never presented to the jury because trial counsel failed to present this very important forensic evidence to the jury. In light of the myriad of ever changing stories that these two witnesses told during the entire course of this case, forensic evidence that would undermine the veracity of their stories was critical to the defense. Scientific analysis is not subject to the vagaries of witness testimony which at its best is subject to negligent error and at its worst, subject to dishonesty.

With respect to Richard Ford's trial testimony, trial counsel again failed to introduce objective evidence that would have undermined Ford's testimony. Specifically, Ford testified

that when he heard Mr. Prunty allegedly say "you were my friend,[4] how could you steal my shit? I should kill you," he was directly under the first floor kitchen when he heard these statements. Ex.20 at 10. Further elaborating, Ford testified that Mr. Prunty was five feet above my head at the time he allegedly heard these statements. Ex.20 at 10. Once again, the evidence does not support this testimony.

Ford testified that he was in a room with a makeshift bed in it getting high from cocaine when he heard the alleged statements made by Mr. Prunty. Ex.20 at 11,15. As evidenced in the layout of the home and the police photos taken of the incident, Ford was in the back bedroom which, in fact, was at the opposite end of the home where the shooting took place. In fact, the bedroom that Ford testified he was in when he heard the statements was directly under the laundry room on the first floor. Ex.20 at 13-15. Contrary to his testimony, the washer and dryer were "five feet above his head." This places Ford approximately 25 feet from the shooting that occurred on the first floor. Ex.20 at 14; Aff. of Prunty. Additionally, directly above Ford's head was 9 inches of insulation for sound proofing that was installed to keep the noise of the daycare operated by Mr. Prunty's wife to a minimum. Aff. of Prunty; Ex.8 at 9. These

[4] It is highly improbable that Mr. Prunty would describe Wells as a friend when he hardly knew him. Aff. of Mr. Prunty.

facts and errors in Ford's testimony undermine the credibility of this witness and also his ability to hear what was being said on the first floor of the home. Another missed opportunity to present objective evidence that would cast doubt on the ability of this witness to hear any of the statements attributed to Mr. Prunty.

Trial counsel's failure to present objective evidence and expert opinion to impeach these witnesses who implicated the defendant in the shooting constitutes ineffective assistance of counsel which deprived the defendant of a genuine avenue of defense.

**C. The failure to hire a ballistic expert allowed the Commonwealth to be the sole purveyor of expert opinion and allowed the Commonwealth's experts to incorrectly opine on the gunshot residue evidence.**

"By permitting the Commonwealth to be the sole purveyor of expert ... evidence to the jury, trial counsel ceded a distinct, if not decisive, advantage to the Commonwealth." Commonwealth v. Baran, 74 Mass. App. Ct. 256, 277 (2009). Defense counsel's failure to utilize a ballistic expert at trial allowed the Commonwealth unfettered control of its rendition of facts which ultimately proved to be scientifically impossible. Utilization of the appropriate experts was absolutely necessary in order to prepare the defense in this case. If a ballistic expert had been utilized, the errors in the Commonwealth's expert analysis and

concomitant opinions would have been exposed for their inaccuracy and the correct rendition of the facts would have been presented to the jury. Draughton v. Dretke, 427 F.3d 286 (5th Cir. 2005)(Counsel's failure to obtain forensic evidence on the trajectory of the fatal bullet was constitutionally deficient representation); Soffar v. Dretke, 368 F.3d 441 (5th Cir. 2004)(Counsel ineffective for failing to consult a ballistic expert to probe clear discrepancies between the ballistic evidence and the state's theory of the case).

Moreover, appellate counsel was also ineffective in failing to use a ballistic expert to expose the forensic inaccuracy of the Commonwealth's case. In Showers v. Beard, 635 F.3d 625 (3rd. Cir. 2011), the appellate court held that appellate counsel's failure to argue that trial counsel was ineffective for failing to present expert evidence to counter the prosecutor's theory of the case was constitutionally deficient representation. Similarly, appellate counsel's performance in this case was also constitutionally deficient when he failed to file a motion for a new trial raising the forensic deficiencies in the trial below. As such, appellate counsel also deprived Mr. Prunty of his constitutional right to present a defense.

In addition to the errors previously discussed, the Commonwealth's expert rendered an opinion regarding gunshot residue without undertaking any scientific testing. It is

undisputed that there was no gunshot residue found on Mr. Prunty's hands within three and a half hours of the shooting. In an effort to undermine this obvious exculpatory evidence, the Commonwealth's ballistic expert opined that he would "not expect gunshot residue to be recovered on anybody's hands if [he] fired one round out of this gun." Ex.7 at 758. This expert further opined, without doing any testing, that there would be no gunshot residue on the clothing of the person who fired the weapon. Ex.7 at 760. This expert based this opinion on no scientific testing of the rifle used by the shooter in this case. Ex.7 at 759.

Rendering an opinion without any scientific testing violates standard protocol for gunshot residue testing. Aff. of Robinson at 6-7. Mr. Robinson further opined that in order to render an opinion of whether gunshot residue would be found on surrounding objects and/or people, "the appropriate scientific testing needs to be performed before any opinion can be rendered." Id. at 7. The Commonwealth's expert violated basic scientific protocol which rendered his opinion meaningless and misleading.

Further, Mr. Robinson also opined that based upon the hyper-velocity cartridge used in this case and the fact that this kind of ammunition holds more powder, more "gsr" would be deposited on the shooter's hands and the surrounding areas. Aff.

Robinson at 6. He further opined that "the hands of the individual who fired [the] weapon would probably show the presence of gunshot residue." Id. He further stated that testing is necessary in order to confirm this probability. Id. Mr. Robinson based his opinion on the numerous tests he performed with the same rifle and ammunition used in this case. Id. Apparently, defense counsel wanted to introduce this kind of expert testimony regarding gunshot residue when he moved to introduce expert testimony that his alleged expert would testify that one would "expect there to be some gunshot residue somewhere in the vicinity of the shooting." Ex.8 at 2. Unfortunately, again, defense counsel never introduced this opinion testimony at trial.

Seizing on defense counsel's blunder, during closing argument, the prosecutor stated the following: "Just with respect to the gunshot residue, which again is an unreliable test based on what you heard—Mike Arnold said you wouldn't expect to get gunshot residue on this portion of the gun." Ex.19 at 12. Again, it was necessary to obtain and introduce expert testimony regarding the GSR kit and its reliability. None was introduced at trial and once again, the flawed expert testimony of the Commonwealth's expert went unchallenged.

Additionally, Mr. Robinson opines that the gunshot residue testing performed on Mr. Prunty was well within the time frame

allotted by numerous scientific entities. Aff. of Robinson. Mr. Robinson personally spoke with Doug Peavy, President of Lynn Peavy, on 8/24/2015, the manufacturer of the GSR kit utilized in testing Mr. Prunty's hands in this case. Id. at 7. Mr. Robinson queried Mr. Peavy about the recommended time allotment: Mr. Peavy was asked about the 3 hour value listed on the gsr kit used in this case and how they came to the value of the 3 hours. Id. Mr. Peavy stated that they came to this value by contacting local and state labs and evaluating what their limits were and then came to the value that would give the test the best chance to succeed. Id. He said that the test could be performed at a time greater than 3 hours; this was just the recommended time. Id. Based upon this evidence, the lack of GSR on Mr. Prunty was important and forensically credible evidence that he did not shoot the gun in this case. The jury heard the opposite and erroneous testimony regarding this critical evidence from the police officer who testified at trial.

The prosecutor's assertion that the gunshot residue test utilized in this case was an unreliable test is simply wrong. The method of analysis utilized by the Massachusetts state police lab in this case was the SEM-EDX analysis. Id. The chemists testified that the time limits between a shooting incident and the collection of GSR on live subjects was four hours. Ex.17 at 10,24-25. The chemists also testified that the

manufacturer recommended that the collection occur within three hours. Ex.17 at 10,24-25. However, at the time of this shooting, the FBI Laboratory used a cutoff of 5 hours. Aff. of Robinson at 8. At an FBI symposium on GSR held during 2005, many participants stated that an acceptable cutoff time was 4 to 6 hours after the shooting event, whereas some felt that up to 8 hours was appropriate. Id. Still others were comfortable accepting lifts taken more than 12 hours after the shooting. Id. According to Dr. DiMaio, a renowned expert in the field, analysis on the hands of firers by SEM has been positive up to 12 hours after they fired the weapon. Id. Mr. Robinson opined that the GSR testing done on Mr. Prunty within three and a half hours of the shooting comports with the accepted scientific community's time frame guidelines for collecting GSR. Id. Again, the jury never heard that the lack of finding gunshot residue on Mr. Prunty immediately after the shooting was important and probative evidence that he did not shoot the gun. The prosecutor's attempt to undermine this probative and exculpatory forensic evidence is simply not supported by the scientific community, nor the manufacturer of the GSR kit.

In the instant case, the defendant was denied his constitutional right to effective assistance of counsel because defense counsel, both trial and appellate, failed to hire and utilize a GSR expert. If a ballistic expert had been utilized,

the errors in the Commonwealth's expert analysis and concomitant opinions would have been exposed for their inaccuracy and the correct rendition of the facts would have been presented to the jury.

**D. Defense counsels' failure to utilize all of the scientific evidence available to support a Bowden defense deprived the defendant of a substantial ground of defense.**

Trial counsel argued that the police failed to perform important tests which undermined the police investigation and concomitant conclusion that Mr. Prunty was the shooter. Ex.19 at 15-19. The fact that certain tests were not conducted or that certain police procedures were not followed could raise a reasonable doubt with the jury as to the defendant's guilt. Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980). With regard to gunshot residue, trial counsel argued that the police failed to do GSR testing on Mr. Rose's shirt. Ex.19 at 18. He further argued that "you should be scratching your head about that one." Ex.19 at 18. More perplexing is defense counsel's failure to utilize the most important evidence in support of a Bowden defense, failure to test Mr. Prunty's clothes for gunshot residue.

All of Mr. Prunty's clothes that he was wearing on the day of the shooting were seized by the police. Ex.18 at 1,2. On October 29, 2004, Assistant District Attorney Thibeault requested that all of Mr. Prunty's clothes be tested for gunshot

residue. Ex.18 at 4. Within days of this request, on November 5, 2004, Assistant District Attorney Welsh ordered the state lab not to perform any tests for gunshot residue on Mr. Prunty's clothes. Ex.18 at 2,3. As such, Mr. Prunty's clothes were never tested for gunshot residue.

As previously discussed, Mr. Robinson opined that the hands of the individual who fired the weapon would probably show the presence of gunshot residue. Aff. of Mr. Robinson. However, to be certain, the appropriate testing should be undertaken. Further elaborating, he opined that if the hands of the shooter were washed, the clothing worn by individuals close to the weapon when it was fired would indicate the presence of gunshot residue. Id. Gunshot residue particles adhere to clothing longer than to the skin of a shooter or people in the vicinity of the shooting. Id. Mr. Robinson performed numerous tests with the type of ammunition and firearm involved in this case and he found that the combination of both produce a large amount of gunshot residue. Id. Mr. Robinson opined that chemical testing of the clothing in this case was imperative in order to determine the person or person's close to the victim when the shooting occurred. Id. Apparently, ADA Thibeault agreed with Mr. Robinson when she ordered Mr. Prunty's clothing to be tested for gunshot residue.

Unfortunately, the fact that the State Police Crime Laboratory failed to perform any GSR testing on Mr. Prunty's clothes was never brought out during cross-examination of any of the chemists at trial. Ex.17 at 1-32. Despite violating basic scientific protocol in failing to perform GSR testing on Mr. Prunty's clothing, the fact that the police performed voluminous GSR testing on other items is indicative of selective testing in order to ensure that Mr. Prunty was found guilty by failing to perform tests that could have produced exculpatory evidence.

Specifically, the police and Assistant District Attorney Welsh ordered that the trash seized in Mr. Prunty's home be tested for DNA and GSR. Ex.18 at 5,6. The state lab utilized all of its resources to perform DNA and GSR testing on twenty one (21) pieces of trash. Ex.18 at 7. In fact, the police requested that the DNA testing be rushed. Ex.18 at 10. All of these tests did not provide any inculpatory evidence against Mr. Prunty. Ex.18 at 12-13. The fact that the Commonwealth expended an inordinate amount of lab resources testing trash and failed to perform GSR testing on Mr. Prunty's clothing is perplexing and supportive of a Bowden defense that defense counsel failed to raise. All of this information was found within the confines of the defense file and well within reach of both trial and appellate counsel.

Defense counsel also failed to introduce expert testimony that would support a Bowden defense. Specifically, Officer Arnold's conclusion that there would be no gunshot residue on "anybody's hands if I fired one round out of this gun" is completely without any scientific basis or testing. Officer Arnold's offering an opinion with regard to the presence or absence of gunshot residue on clothing and/or skin of the shooter or individuals in the vicinity violates very basic scientific protocol because absolutely no testing for gunshot residue was undertaken by him in this case. Mr. Robinson states that "in order to scientifically evaluate whether gunshot residue would be found on surrounding objects and the distance of these objects, the appropriate scientific testing needs to be performed before any opinion can be rendered regarding this issue." Aff. of Mr. Robinson at 6,7.

Mr. Robinson opines that the following testing should have been performed in this case:

I. "Weapon tests: Function testing-includes the operation of the safeties and the overall operability of the rifle. Ejection pattern testing of the weapon with the CCI stinger ammunition. Muzzle to Target testing to determine the exact range of fire. Gunshot residue testing of the rifle.

II. Blood Spatter Analysis-testing by simulating spatter patterns with the weapon and ammunition. The clothing can be

examined by a private lab for gunshot residue and blood spatter on the defendant's clothes seized on the day of the shooting." Aff. of Robinson at 9-10. Mr. Robinson concluded that the lack of forensic testing in this case fell below the professional norm. Id. None of this expert testimony was presented to the jury.

Defense counsel failed to prepare or execute a reasonable defense based upon all of the evidence at his disposal. A review of the errors and omissions committed by defense counsel show a pattern of inattention and lack of preparedness. These errors, possibly in isolation, but most certainly when assessed cumulatively, resulted in ineffectiveness of counsel that reaches the constitutional threshold to warrant a new trial. See Lindstadt v. Keane, 239 F.3d 191, 202 (2nd Cir. 2001)(holding that errors must be assessed cumulatively); Commonwealth v. Aviles, 40 Mass. App. Ct. 440, 447 (1996) (cumulative effect of counsel's errors was to deprive the defendant of a legitimate defense). Defense counsel's significant lapses in effective representation viewed cumulatively warrants the granting of a new trial.

**II. Coercing Pape by threats to charge her with perjury in order to change her previously sworn testimony and then indicting and incarcerating her until she recanted five months later violates the defendant's due process right to a fair trial and his Sixth Amendment right to call witnesses favorable to him without interference by the prosecutor or other agencies of the government.**

The defendant has a right to present his defense and to call witnesses favorable to him without interference by the prosecutor or other agencies of the government. Washington v. Texas, 388 U.S. 14, 19 (1967). This right is a fundamental element of the due process of law. Id. at 19; art. 12 of the Massachusetts Declaration of Rights. Moreover, the defendant has a Sixth Amendment right to compulsory process to obtain exculpatory witnesses. Id. at 17-19. By preventing the key defense witness, Rebecca Pape, from giving exculpatory evidence by threatening, subsequently charging and incarcerating her for perjury until she changed her testimony denied Mr. Prunty his state and federal due process rights and right to compulsory process.

In the instant case, the prosecutor prevented Pape from giving exculpatory testimony for the defendant by threatening her with perjury and jail. After this alleged crime, Pape told the police, the Grand Jury, an investigator, Mr. Iliffe, Mr. Prunty, her boyfriend, and her parents that she was in the bathroom with Mr. Prunty when Wells was shot and killed. Ex.1 at 15-20,26,32-33; Ex.2 at 17-19; Ex.5 at 440, 442, 453-454, 456-457, 465, 470-487, 489, 493-496; Ex.6; aff. of Iliffe. As a result of giving Mr. Prunty this alibi, the police repeatedly called her a liar and threatened her with incarceration. Ex.1 at

20,22,23,26-27,35-37. They forced Pape to take a lie detector test over and over again. Ex.1 at 28-29.

Two days before her Grand Jury testimony, the prosecutor called Pape a liar and accused her of trying to protect Mr. Prunty. Ex.1 at 32-33. The prosecutor also told Pape that she would be going to jail for perjury and that he would make sure she did "jail time." Ex. 1 at 32-33. Pape felt that she was being forced to commit perjury. Ex.1 at 33; aff. of Iliffe.

Despite all this pressure, during her Grand Jury testimony, Pape testified that Mr. Prunty was with her in the bathroom when Wells was shot. Ex.2 at 16-18,27. On the same day of her grand jury testimony, Pape was indicted for perjury. Ex.3 at 1. The prosecutor made good on his threats by incarcerating Pape. Approximately sixteen months later,(sixteen months served), Pape testified at trial that she saw Mr. Prunty shoot Wells. Ex.3 at 3; Ex.4 at 7; Ex.5 at 415-416.

The Sixth Amendment guarantees a defendant the right "to have compulsory process for obtaining witnesses in his favor." This means that a defendant has a right to present his defense and t witn s favorable to him without interference by t er agencies of the government. Washington he right to offer the testimony of witnesses, ttendance, if necessary, is in plain terms a defense." Id. It is well established that

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The Sixth Amendment guarantees a defendant the right "to have compulsory process for obtaining witnesses in his favor." This means that a defendant has a right to present his defense and to call witnesses favorable to him without interference by the prosecutor or other agencies of the government. Washington v. Texas, at 19. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." Id. It is well established that

"substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984); Commonwealth v. Turner, 37 Mass. App. Ct. 385, 387 (1994).

In Webb v. Texas, 409 U.S. 95 (1972), the Court reversed a conviction because the trial judge improperly singled out the defendant's only witness for a prolonged warning that he could be charged with perjury if he testified falsely and that the resulting sentence would be added to the one he was serving and impair his chances for parole. Not surprisingly, after this warning, the witness refused to testify. The Court concluded that "the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the [defendant] of due process of law..." Id. at 97-98.

In the case at bar, the prosecutor's threatening, charging and incarcerating Pape with perjury until she changed her testimony was far more coercive than the trial judge's "prolonged warnings" in Webb v. Texas, Id.. In this case, the prosecutor told Pape that she would be going to jail for perjury and that he would make sure she did "jail time." Ex. 1 at 32-33. Moreover, the police, at every turn, echoed the prosecutor's threats with identical threats of charging Pape with perjury and

jail time. Ex.1 at 20,22,23,26-27,35-37. These threats effectively drove Pape, the defense's only witness, from the stand. These tactics deprived Mr. Prunty of his due process rights and rights to compulsory process.

Moreover, the prosecutor expressly told Pape that she would be going to jail for perjury and that he would make sure she did "jail time." Ex. 1 at 32-33. Similarly, in Commonwealth v. Turner, 37 Mass. App. Ct. at 387, the prosecutor threatened the defense witnesses and told them that "You better not show up in court," "I'll tear you apart," and "I'll end up putting you away too." The Court held that the prosecutor's threatening two witnesses, as a result of which the witnesses refused to testify on behalf of the defendant, violated the defendant's due process right and reversed the conviction. Similarly, the prosecutor's threat that he would make sure Pape did "jail time" was the identical threat as that made in Turner, Id.; the prosecutor's threats interfered with Mr. Prunty's only defense witness and it violated his constitutional due process rights and right to compulsory process.

Further, it is prosecutorial misconduct to use coercive or intimidating language or tactics that substantially interfere with a defense witness's free and unhampered decision to testify. Commonwealth v. Teixeira, 76 Mass. App. Ct. 101, 105 (2010). "There is simply no excuse for a police officer

approaching any witness or party in a pending criminal matter and engaging in 'deliberate and intentional' conduct that has a reasonable possibility of affecting the course of trial proceedings". Id. at 105. "Where a defendant shows that the government has engaged in misconduct having the potential to interfere with a constitutional guarantee, the Commonwealth bears the burden of showing that no interference actually occurred." Commonwealth v. Teixeira, 76 Mass. App. Ct. at 106. Prosecutorial misconduct that is egregious, deliberate, and intentional, or that results in a violation of a constitutional right may give rise to presumptive prejudice. Commonwealth v. Cronk, 396 Mass. 194, 198-99 (1985).

The misconduct in this case is similar to that in People v. Russ, 589 N.E.2d 375; 581 N.Y.S.2d. 152 (1992). The defendant in Russ was accused of shooting and killing the victim during the course of a mugging. A police officer interviewed two teenage witnesses whom he already knew and eventually secured their cooperation to testify at a grand jury proceeding in order to indict the defendant. The two witnesses testified that they had seen the defendant shoot the victim. Ten months later, the same two witnesses recanted their grand jury testimony and stated that they did not see who shot the victim. At the defendant's trial, one of the witnesses testified that she did not see the defendant shoot the victim. After this testimony, the witness

was arrested and charged with perjury, taken in handcuffs to the district attorney's office where she was interrogated and threatened with two to seven years in prison. Id. at 154. She was taken to jail until her trial testimony where she inculpated the defendant; her perjury charges were then dropped and she was released from police custody. The Court of Appeals found the intimidation of this witness egregious and concluded that the witness was "legally" coerced to change her testimony. Id. at 155. The court granted a new trial.

Similarly, the police and the prosecutor in this case repeatedly threatened Pape with perjury and jail and engaged in misconduct by substantially interfering with her decision to testify and how to testify. Ex.1 at 20,22,23,26-27,35-37. The prosecutor and the police coerced Pape into testifying against Mr. Prunty at trial by threatening her with perjury charges and exposure to twenty years of incarceration in state prison. The prosecutor told Pape that she would be going to jail for perjury and that he would make sure she did "jail time." Ex. 1 at 32-33. They followed through on their threats by indicting Pape and incarcerating her until she changed her story.

In United States v. Morrison, 535 F.2d 223 (3rd. Cir. 1976), the Court held that the threatening and coercive tactics of the Assistant United States Attorney (AUSA) was responsible for a defense witness refusing to testify, thus depriving the

defendant of the due process of law; the Court reversed the trial court's ruling and granted a new trial. The prosecutor's coercive acts included advising the witness that she was liable to be prosecuted on drug charges and that if she testified for the defendant, that testimony would be used as evidence against her for federal perjury charges. Not content that these messages would adequately alert her to her peril, the prosecutor sent a subpoena to the witness and had her brought into his office. Surrounded by three law enforcement officers, the prosecutor again impressed upon the witness about the dangers of testifying. The witness felt increasingly intimidated under these barrage of warnings and took the stand and pled the Fifth, thus depriving the defendant of much of the evidence he had expected to place before the jury. The Court of Appeals held that the pressure brought to bear on the defense witness by the AUSA interfered with the voluntariness of the witness's choice and infringed upon the defendant's constitutional right to have her freely-given testimony.

Similarly, Pape was called into the prosecutor's office with three or four state troopers and threatened with prosecution for perjury. Specifically, the prosecutor said that Pape was a liar and "you're going to go to jail for perjury. And we're going to make sure you go to jail for perjury, and you're going to do jail time." Ex.1 at 32-33. The prosecutor made good

on these threats and arrested and incarcerated Pape. As in the Morrison case, the prosecutor interfered with the voluntariness of Pape's choice to testify at trial and infringed upon the defendant's constitutional right to have her freely-given testimony.

In the instant case, the prosecutor had no forensic evidence tying Mr. Prunty to the shooting and based its case entirely on two eyewitnesses, the most critical being Pape, the alibi witness. The prosecutor, who presumed Pape was lying, coerced Pape into testifying falsely by charging her with perjury and then incarcerating her. Attacking and neutralizing Pape in this manner amounted to eviscerating Prunty's sole defense of alibi. Neutralizing Pape with such obvious coercion violated Prunty's federal and state constitutional rights to due process.

Based upon the forensic evidence as previously discussed, Pape's trial testimony plainly shows that she was lying when she incriminated Mr. Prunty. More specifically, during direct testimony, Pape more or less did as the prosecutor required in order to escape her perjury indictment. She said that she saw Prunty holding the rifle when it fired, killing Wells. Ex.5 at 415-16,433. During cross-examination, however, Pape's credibility disintegrated to such an extent that Pape cannot,

constitutionally, be the source of evidence for a murder in the first degree conviction.

Specifically, during cross-examination, Pape admitted that she currently was still being held on perjury charges. Id. at 434. Shortly after the shooting, she said that Prunty was with her in the bathroom when Wells was shot. Id. at 440-442. Pape insisted to her boyfriend that she planned to tell the truth to the Grand Jury, which would exculpate Prunty, even though that was not what the Commonwealth wanted to hear. Id. at 466-467. Before she agreed to testify at Prunty's trial, Pape also told her boyfriend that she was being coerced and wanted to get a deal for herself and for her boyfriend. Id. at 459. Pape was adamant that she would not testify without getting a plea deal. Id. at 460-461,463-465. Pape and her boyfriend were concocting a way to get a deal for both of them in exchange for coerced testimony from Pape that Prunty was the shooter. Id. at 468-71.

Pape admitted that just before she recanted her testimony exculpating Prunty, her lawyer had met with the prosecutor and the state police about her testifying against Prunty. Id. at 504-507. Her newly proposed testimony would contradict every statement she had made to everyone since the time of the murder. Id. at 507-509.

The above survey of Pape's testimony at trial shows that her credibility wasn't just weak, it didn't exist. There was no

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The above survey of Pape's testimony at trial shows that her credibility wasn't just weak, it didn't exist. There was no

fair justification for believing anything she said, inculpatory or exculpatory; it is clear that her trial testimony was coerced. Pape was an important eyewitness used to support Prunty's murder conviction. The Commonwealth overreached and contaminated the process with Pape's useless trial testimony. The government's improper conduct interfered with the defendant's right to present his defense and thus violated his due process rights and right to compulsory process.

**III. The police and the prosecutor violated Mr. Prunty's due process rights when they threatened Pape with incarceration for perjury unless she inculpated Mr. Prunty. Following through on this threat, Pape was charged and incarcerated for perjury until she recanted five months later and was consequently rewarded for her inculpatory trial testimony with a lenient plea deal. Rose, Salamone and Ford were similarly rewarded for implicating Mr. Prunty. These circumstances prove implicit and undisclosed deals.**

A defendant's due process rights are violated where the prosecution does not disclose evidence that is material to the issue of guilt, including evidence tending to impeach the credibility of a key prosecution witness. Commonwealth v. Hill, 432 Mass. 704, 715 (2000). An agreement to testify in a particular way, regardless of its truth, makes that testimony inadmissible and a violation of due process. *See* Commonwealth v. Burgos, 462 Mass. 52, 63-64, & n.10 (2012)(failure to disclose evidence that is material to the issue of guilt violates due process), citing Commonwealth v. Rosado, 408 Mass. 561, 565 (1990). "Understandings, agreements, promises, or any similar

arrangements between the government and a significant government witness [are] exculpatory evidence that must be disclosed." Hill, 432 Mass. at 715-716. Further, "where the witness's credibility is a critical issue in the case, the requirements of due process also mandate that the jury be aware of 'evidence of any understanding or agreement as to a future prosecution.'" Commonwealth v. Michel, 367 Mass. 454, 460 (1975), quoting Giglio v. United States, 405 U.S. 150, 154-155 (1972).

Alibi witness Rebecca Pape was indicted, arrested and incarcerated for perjury immediately following her Grand Jury Testimony. She changed her testimony five months later, immediately after her lawyer met with the prosecutor and the police, Ex.5 at 504-07; Pape then inculpated Mr. Prunty at trial. Soon after trial, this Court accepted her plea, with the prosecutor's agreement, and imposed an extremely lenient sentence (time served), resolving perjury charges and a significant number of additional pending charges.[5] There was evidence from an investigator's interview, from a police officer's Grand Jury testimony, and from recorded telephone calls by Ms. Pape, that she was seeking and demanding a plea

[5] Pape was facing charges of larceny from a building (two counts), receiving stolen property (exposure of up to five years in state prison), larceny by false pretenses (four counts) (exposure of up to five years in state prison), forgery (two counts) (exposure of up to ten years in state prison), threatening to commit a crime, and perjury (exposure of up to twenty years in state prison). Plea Colloquy Ex.4 at 2-3,11.

agreement before she would testify against Mr. Prunty. Defense counsel elicited that Pape told her boyfriend that she wanted to get her court cases dropped in exchange for testifying that Prunty did this shooting. Ex.5 at 458. *See* Argument II above for additional evidence of a plea deal. The prosecutor's assertions that there was no plea agreement, (Ex.5 at 455-456), is not credible. These circumstances, by themselves, support the fair inference that Mr. Prunty's conviction violated due process.

Even this Court chastised Pape at the completion of her plea agreement about her not having the slightest notion about telling the truth. Ex.4 at 24. This Court told Pape that she is amoral and that she had "no more idea of what a lie is from the truth than this water jug sitting on the top of my bench." Id. Despite what the prosecutor and the police believed they knew, even if in good faith, and despite what may even be true, the United States Constitution and the Massachusetts Declaration of Rights do not permit a conviction where the key witness's testimony is so tainted. Even though prosecutors, at times, are forced to explain to jurors that they must take their witnesses as they find them when attempting to support convictions on the words of habitual criminals with significant credibility problems, due process requires at least some threshold, however low. In addition to her current charges and contradictory testimony imbued with overwhelming coercion, Ms. Pape had a

substantial criminal record. She simply has no credibility. *See* Ex.3, Pape's criminal record.

Rose similarly exculpated Prunty to the police and to the Grand Jury. Specifically, immediately after the shooting, Rose told the police that "he did not witness the shooting." Ex.11 at 1; Ex.13 at 6. Additionally, Rose also testified under oath at Mr. Prunty's grand jury hearing that he was not in the room when the shooting occurred and he did not see what happened at the time of the shooting. Ex.12 at 148-150, 153-157, 162-166. At the hearing, Mr. Rose also thought that Wells shot himself because "he's so depressed from everybody antagonizing him." Id. at 156-157. Mr. Rose further elaborated that he never saw the gun immediately before or after the shooting. Id. at 159, 169, 176.

Five months before trial began in Mr. Prunty's case, Rose was charged with perjury. Ex.13. Rose incriminated Prunty at trial while he was incarcerated for perjury pending trial on his own perjury charges for his exculpatory testimony at Mr. Prunty's grand jury hearing. Ex.9 at 588; Ex.13. Just seventeen (17) days after his trial testimony on February 10, 2006, Rose received a very lenient sentence of one year after pleading guilty to perjury and was released shortly thereafter on time served. Ex.14 (Rose Plea Colloquy Transcript). This light sentence is also perplexing in light of Rose's lengthy criminal history. Ex.14. (CORI history).

The third significant witness against Prunty, Thomas Salamone, a known informant, testified only to what was contained in the police reports. Ex.15 at 843-844, 846,848-849. According to Salamone, during Salamone's alleged conversations with Prunty while they were incarcerated together, Prunty admitted to shooting Wells. Ex.15 at 848. Salamone was incarcerated at the time of this testimony and he was "trying to work out a plea agreement." Ex.15 at 863. As a result, Salamone also received a light sentence after pleading guilty to multiple charges of breaking and entering, larceny from a building, larceny of a motor vehicle, operating a motor vehicle to endanger, failure to stop for police, leaving the scene after causing property damage, forgery, uttering, and larceny. Ex.16 at 2-4; Salamone Plea Colloquy. The prosecutor stated to the sentencing judge that his recommendation of 27 months in the House of Correction sounded "very odd" for the seriousness of the charged offenses. Ex.16 at 8. The seriousness of these charges was echoed by a second prosecutor at the sentencing hearing who was also the prosecuting attorney in Mr. Prunty's case. Ex.16 at 28. More perplexing is that no probation was requested by the prosecutor or ordered by the sentencing judge for an individual with such a long criminal history. Ex.16 at 8; Ex.15 at 864-867. Salamone was sentenced essentially to time served and was released within weeks of his testimony. Ex.16 at

8. Before testifying against Prunty, Salamone was facing up to twenty years in prison. Id. at 13.

The prosecutor at Mr. Prunty's trial asked the sentencing judge for Salamone to adopt his lenient recommendation for such serious charges because Salamone was "an individual who to some degree has helped the government in cases; and for that reason, as a mitigating factor, we're making this recommendation." Ex.16 at 28. The sentencing judge adopted the prosecutor's recommendation and Salamone was released from custody shortly after the hearing.

With regard to Richard Ford, an individual with serious addictions to heroin and cocaine and an inability to comply with his probation conditions, also received lenient treatment after his testimony. Ex.20 at 1-7. Specifically, Ford had a long standing history of violating his probation and for these violations, bail was consistently set for $5,000 every time he violated probation for his many offenses. Ex.20 at 5-6. On August 11, 2004, four days after the shooting, a warrant issued for Ford for violating the conditions of his probation. Ex.20 at 6. On August 18, 2004, the day after Ford testified against Mr. Prunty, Ford's warrant was recalled, no bail was required as routinely done, and Ford was allowed to choose another treatment program of his choosing. Ex.20 at 6,8. Interestingly, Pape confirmed that a deal was made with the prosecutor and Ford to

"get rid of all his probation surrenders ... and they put him in a halfway house to get him clean." Ex.6 at 46-47. This statement confirms exactly what transpired on August 18, 2004, the day after his testimony against Prunty, with regard to Ford's probation violations. Ex.20 at 6.

Any communication that suggests preferential treatment to a key government witness in return for that witness's testimony is a matter that must be disclosed by the Commonwealth. Commonwealth v. Hill, 432 Mass. 704, 716 (2000). The Hill Court found that the Commonwealth's assertion that it did not enter into an agreement with a witness was untenable. Id. at 716-17. According to the Hill Court, although the terms of the agreement were "imperfect in . . . clarity," the motion judge determined that whatever the arrangement between the Commonwealth and a witness, it was certainly a "material arrangement." The Hill Court took the occasion:

> "to emphasize that any communication that suggests preferential treatment to a key government witness in return for that witness's testimony is a matter that must be disclosed by the Commonwealth. The fact that the terms of the agreement are not clearly delineated does not insulate the arrangement from disclosure. Indeed, the very nature of the situation may well require that its terms be vague as the consideration given may be dependent on the degree of cooperation. But even without precise terms, the government easily can induce a witness to believe that his treatment is dependent on his testimony. Thus, if any communication is reasonably susceptible of such an interpretation, it must be disclosed to the defense." Id. at 716-17,

*citing* Commonwealth v. Gilday, 382 Mass. 166, 175 (1980).

If there was just one important eyewitness in this case testifying for the prosecution facing a twenty year sentence, then the prosecutor's assertion that there was no deal may not have seemed farfetched. However, every witness who allegedly witnessed this shooting and inculpated Prunty had substantial criminal records and were facing perjury charges in addition to other criminal charges. One of these witnesses was a known informant with a substantial criminal record. All of the Commonwealth witnesses entered into plea deals which resulted in nearly, or completely, time served. These circumstances belie the prosecutor's claim that there were no deals given in this case. The Hill court cautioned trial judges not to put form over function when evaluating whether deals were given by the prosecutor.

For the above reasons, the Commonwealth should not be allowed to argue that Pape, Rose, Salamone and Ford had no plea deals solely because the prosecutor declined to expressly tell them that they would be treated with enormous leniency. The sequences and evidence speak for themselves. Under the circumstances of this case, Pape, Rose, Salamone and Ford each knew that they had a deal, whether explicit or implicit. Implicit deals are still deals. The failure to disclose them

violates due process. Hill, 432 Mass. at 715; Giglio, 405 U.S. at 154-155.

**IV. An evidentiary hearing is required in this case in order to resolve the factual issues surrounding the ineffective assistance of counsel claim.**

The defendant further requests an evidentiary hearing before final disposition of this motion. Commonwealth v. Caban, 48 Mass. App. Ct. 179, 183 (1999), (where affidavits raise a "substantial issue" there must be an evidentiary hearing in order to determine whether the two-prong test for a claim of ineffective assistance of counsel has been established). Based on the affidavits and exhibits attached to this motion, the defendant has raised a serious defense in this case. The defendant is requesting a hearing so that he can present his case for a new trial.

CONCLUSION

For the above reasons, the Defendant, Mr. Prunty, respectfully requests that this Court order a new trial or grant an evidentiary hearing, or reduce the conviction pursuant to the rule 25(b)(2) motion already filed and to be ruled upon with this motion.

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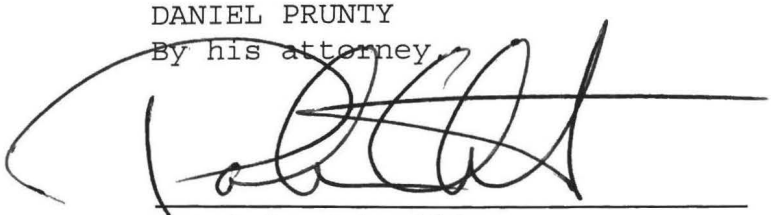
Respectfully submitted,
DANIEL PRUNTY
By his attorney,



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